

Case Nos. 12-1027 and 12-1174

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**In The United States Court Of Appeals For The Sixth Circuit**

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**KINDRED NURSING CENTERS EAST, LLC  
d/b/a Kindred Transitional Care And Rehabilitation—Mobile f/k/a  
Specialty Healthcare And Rehabilitation Center Of Mobile,**

*Petitioner, Cross-Respondent,*

v.

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent, Cross-Petitioner,*

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL  
AND SERVICE WORKERS INTERNATIONAL UNION**

*Intervenor.*

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**ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS  
BOARD AND CROSS-APPLICATION FOR ENFORCEMENT OF SAME**

**Case 15-RC-8773, 357 NLRB No. 83 (Aug. 26, 2011) and  
Case 15-CA-68248, 357 NLRB No. 174 (Dec. 30, 2011)**

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**MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* OF THE  
HONORABLE JOHN KLINE, CHAIRMAN, THE HOUSE COMMITTEE  
ON EDUCATION AND THE WORKFORCE, THE HONORABLE PHIL  
ROE, CHAIRMAN, THE HOUSE HEALTH, EMPLOYMENT, LABOR,  
AND PENSIONS SUBCOMMITTEE OF THE HOUSE COMMITTEE ON  
EDUCATION AND THE WORKFORCE, SENATOR MICHAEL B. ENZI,  
RANKING MEMBER, COMMITTEE ON HEALTH, EDUCATION,  
LABOR AND PENSIONS, AND SENATOR JOHNNY ISAKSON,  
RANKING MEMBER, SUBCOMMITTEE ON EMPLOYMENT AND  
WORKPLACE SAFETY, COMMITTEE ON HEALTH, EDUCATION,  
LABOR AND PENSIONS AS FRIENDS OF THE COURT**

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*Filed In Support Of The Petitioner/Cross-Respondent's Petition for Review*

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Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, Movants, The Honorable John Kline, Chairman, The House Committee on Education and the Workforce, The Honorable Phil Roe, Chairman, the House Health, Employment, Labor, and Pensions Subcommittee of the House Committee on Education and the Workforce, Senator Michael B. Enzi, Ranking Member, Committee on Health, Education, Labor, and Pensions, and Senator Johnny Isakson, Ranking Member, Subcommittee on Employment and Workplace Safety, Committee on Health, Education, Labor and Pensions, respectfully move the Court for leave to participate as *amici curiae* and file the accompanying brief in support

of the Petitioner, Cross-Respondent inasmuch as The National Labor Relations Act (“the Act”) and legislative history establish that the National Labor Relations Board (“the Board”) exceeded its authority and acted in contravention of the Act by issuing *Specialty Healthcare*, 357 NLRB No. 83 (Aug. 26, 2011).

## **I. INTEREST OF MOVANTS**

Movants are Members of Congress who believe it is critical to preserve the policies that underlie the labor laws administered by the National Labor Relations Board (“NLRB”). Movants believe that the NLRB, an independent government agency created by statute, attempted to circumvent the legislative process and Congressional policy when it decided *Specialty Healthcare*, 357 NLRB No. 83 (Aug. 26, 2012). Movants, as Members of Congress, have an interest in preserving the policy that went into enacting the legislation, and believe it would be most helpful to this Court to have the benefit of their perspectives on such important matters.

## **II. AN AMICUS BRIEF IS DESIRABLE AND THE MATTERS ASSERTED ARE RELEVANT TO THE DISPOSITION OF THE CASE**

Movants wish to bring to this Court’s attention the incompatibility between the Acts of Congress establishing national labor policy, and the Board’s *Specialty Healthcare* decision. In particular, the Movants believe the Board’s *Specialty Healthcare* decision changes the determination of appropriate bargaining units for

every workplace under the Board's jurisdiction by rendering the extent of employee organization the primary, and likely only, factor relevant to establishing a bargaining unit. This effectively eliminates Section 9(c)(5) the Act, which Congress inserted in 1947 to enhance the principle of majority rule and workplace democracy, as well as to address the NLRB's practice of permitting the extent of organizing to be the deciding factor in bargaining unit determinations. A major change in the law such as that made by the NLRB in *Specialty Healthcare* should only be achieved through amendment to the statute, not administrative decision. The former is within the exclusive province of Congress. As Members of Congress, with the authority and responsibility to enact laws, the Movants believe the Board's decision contravenes the Act and unlawfully exceeds the authority Congress conferred upon the NLRB. Movants conclude that they find it appropriate and necessary to provide this Court the legislative history and guidance relevant to the issues raised by *Specialty Healthcare*, and the Board's disregard for express Congressional intent.

### **III. CONCLUSION**

WHEREFORE, Movants request this Court to grant the present Motion and allow them to participate as *amici curiae*.

Date: April 23, 2012

Respectfully submitted,

**LITTLER MENDELSON, P.C.**

/s/ Stefan Marculewicz

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 23, 2012, I filed the Motion for Leave to Participate as *Amici Curiae* electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit, using the CM/ECF system, which will send notification of that filing to all counsel of record in this litigation.

/s/ Stefan Marculewicz  
An Attorney for *Amici*

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4/23/12